In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 224

DOMINICK TUFARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 316 F. 2d 240.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1963. On May 24, 1963, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to June 22, 1963, and the petition

was filed on June 21, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence supports the jury's verdict of guilty.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York of violating and conspiring to violate 21 U.S.C. 173 and 174 (unlawful importation of narcotics), and was sentenced to imprisonment for five years.[1] The court of appeals affirmed the conviction in open court.

The evidence showed that one Guippone introduced petitioner to Peterson (in reality a government agent) as "the kid" employed as his runner. When arrangements were made for a sale, Guippone told Peterson that petitioner would bring the "stuff" and would furnish an address where Guippone could be reached. Guippone told Peterson not to mention to petitioner the fact that Peterson would owe a balance (R. 5a-8a). On the night of the sale, petitioner called Peterson to say he had the "merchandise" (R. 12a). When he met Peterson shortly thereafter, he gave him the promised address and told him the merchandise was in a parked automobile at a designated spot (R. 9a). Petitioner drove Peterson to the described parked automobile, told him the merchandise was in the glove

[1] The relevant statutory provisions are reprinted in the petition, pp. 3a-5a.

compartment, explained that he would have trouble opening the compartment, and waited while Peterson entered the parked car, forced open the glove compartment, recovered a package of heroin and returned to the side of petitioner's car (R. 9a-10a). Petitioner then arranged to meet Peterson a few minutes later to give Peterson a chance to "check it out" (R. 10a). The meeting took place in a drug store where Peterson, following petitioner's instructions, handed $4,400 to petitioner in a folded newspaper (R. 11a).

ARGUMENT

There is no merit in the claim that the evidence was insufficient to show that petitioner had possession of the narcotics so as to bring into operation the statutory presumption. From the facts proved the jury could infer not only that petitioner had constructive possession or power to determine custody of the narcotics, which is all that the statute requires, but that he had in fact been in physical contact with the drug. *United States* v. *Cox*, 277 F. 2d 302 (C.A. 2).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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